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March 14, 2000

VIA FACSIMILE: (206) 553-0163Julie Matthews  
Assistant Regional Counsel  
EPA Region 10  
1200 Sixth Avenue  
Seattle, Washington 98101RE: Generator No. 7 (MG 17)  
Construction Schedule  
Docket No. CAA-10-2000-0035  
(In the Matter of Cominco Alaska Incorporated)  
Our File No. 6288-125

Dear Ms. Matthews:

Cominco Alaska Incorporated wrote to EPA Region 10 on February 16, 2000, requesting that EPA stay its December 10, 1999 Order to the State of Alaska Department of Environmental Conservation ("ADEC"), and its February 8, 2000 Order to Cominco. We discussed the reasons why Cominco requested this stay, and in my March 2, 2000 letter to you, I provided additional information you requested regarding the MG-17 construction schedule. Last week EPA issued an Amended Order, which again states that ADEC's December 10, 1999 PSD permit for MG-17 is not valid and Cominco is prohibited from proceeding with construction of MG-17. The Amended Order, however, states Cominco may proceed with certain "weather related" activities which will allow construction of MG-17 to the point the generator and its housing module are delivered to the Mine and the concrete footings of the foundation are poured. The Amended Order does not specifically authorize Cominco to go forward with installing the module on its foundation nor to hook the module up to electrical, heating and other service lines. The Amended Order does not authorize the commissioning or operation of MG-17. Finally, the Amended Order fails to provide protection to Cominco and its officers from severe penalties and sanctions during the course of litigation.

Because the Amended Order falls considerably short of what Cominco requested and what it needs to avoid immediate and irreparable harm, Cominco has no choice but to go

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forward with filing its motion for stay in order to seek to obtain those protections and to allow the court to decide the issue. Due to the impending risks and losses without such protections, we feel compelled to file a motion for stay with the Ninth Circuit on Friday, March 17, unless we hear from you before then that EPA will agree to a stay of its outstanding Orders to Cominco and ADEC that provides complete protection against enforcement risk, penalties and sanctions pending the court's decisions, and allows Cominco to construct, install and operate MG-17. We are also certainly willing to continue discussions after the filing of our motion for stay.

We continue to believe that there is no reason why EPA should not agree to the stay. No environmental harm would be caused by Cominco proceeding with the construction and operation of MG-17 pursuant to ADEC's PSD permit. The NOx emissions would meet National Ambient Air Quality Standards and not exceed the PSD increment. In short, there is no harm in allowing MG-17 to proceed and much harm to Cominco and others in holding it up.

Nor is this the type of case where EPA should feel it's in the public's best interest to "punish" the permittee. As you know, the courts in Allsteel and Solar Turbines did not tolerate leaving the permittee "swinging in the wind" while the state and federal agencies battled over the validity of a state-issued PSD permit. Just as the permittees in those cases, Cominco continues to be exposed to the risk of significant fines and penalties and huge economic losses, despite the fact it has done nothing other than followed all of the legal steps necessary to obtain a PSD permit and is perfectly willing and able to proceed in conformance with that permit.

To assist EPA in considering whether to stay its orders, I will explain in more detail why Cominco is seeking this stay of EPA's March 7, 2000 and earlier orders. This supplements the information provided in my March 2, 2000 letter.

1. **Cominco May Still Be Exposed to Significant Fines and Penalties if it Proceeds in Accordance with the March 7, 2000 Order**

The March 7<sup>th</sup> Order, as well as the outstanding and unaffected December 10, 1999 EPA Order to ADEC, contain the finding that ADEC's PSD permit is not valid, and thus any "construction" of MG-17 by Cominco would be without a PSD permit, exposing Cominco to possible enforcement actions or a citizen's suit for constructing and operating MG-17 without a valid permit. From the discussions that Cominco's counsel had with you on March 7, 2000, we understand that EPA maintains its position that the PSD permit that has been issued to it for MG-17 is invalid, and Cominco is subject to penalties and sanctions for construction and operation of MG-17 during the pendency of the litigation, even though the Amended Order authorizes certain activities. If that is not EPA's intention, and EPA does intend to waive sanctions and penalties for the authorized activities, we believe that would best be accomplished by so stating in a stay order issued by EPA Region 10, together with the other necessary protections discussed in this letter.

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2. **Potential Disputes Over the Scope of the March 7, 2000 Order**

Paragraph 52.a. of the Amended Order lists certain construction activities Cominco may perform, including "other weather-limited activities with advance approval of EPA". The activities listed are not described with particular detail. There is no agency guidance or regulations Cominco can turn to to help it interpret EPA's Amended Order. There is the risk that once the contractors are in the field trying to implement a reasonable construction schedule, they may misinterpret the Order and proceed with a construction activity which may seem perfectly reasonable to them, but which is objectionable to EPA. Although they could try to resolve any objection they find in the Order by calling EPA, we anticipate that despite everyone's best efforts it may be difficult to obtain timely responses.

3. **Cominco Needs to Know Now That it Will be Able to Install the MG-17 Powerhouse Module on its Foundations and Connect it With Utility and Other Service Lines**

The powerhouse module is a very large and heavy structure. It must be transported from the assembly site in Anchorage to the barge on a special carrier. When the barge arrives at the Red Dog Port, the module will be hauled on the special carrier along a 52-mile road to the powerhouse's foundation at the mine. Cominco is currently in negotiations with suppliers of such carriers and barges. Cominco will need to make a decision on the carrier by early April, since Cominco needs to know which carrier will be used in order to construct the bottom of the powerhouse module. It must be built to specifically fit the carrier supplied by the contractor.

Cominco anticipates the contract value for the carrier and barge will be about \$2.5 million. If Cominco gets the module to the Mine, but then cannot put it on its foundations (as we currently interpret the March 7 Order), Cominco will necessarily have to either retain the module carrier on site until the Order is lifted or Cominco is otherwise authorized to put the module on its foundation, or Cominco will have to put the module on blocks and return the carrier to the supplier. If Cominco chooses the latter option, it will need to remobilize the carrier next year. Under either option, Cominco is faced with the likely risk of incurring at least a million dollars of additional costs as a result of it not being able to put the module on its foundations this year. Again, given that there is absolutely no harm to the environment by putting the module on its foundations, we do not understand why EPA would choose to prohibit this activity. Cominco views placing the module and MG-17 on the foundation as weather-related and transportation-related. If EPA does not grant the stay requested, we request that it specifically authorize this activity under the terms of paragraph 52.a.(xi) of the Amended Order. In either case, Cominco needs a decision on the matter no later than April 10, 2000.

The powerhouse module must be kept above freezing temperature to avoid damage to the equipment in the powerhouse. Cominco's construction schedule includes hooking the existing glycol heating loop which would provide heat from the existing powerhouse to the MG-17 powerhouse. EPA's Amended Order does not authorize this, and thus Cominco will need to find

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some other heating source. This could be done using oil-fired portable heaters, which themselves would require the installation of temporary power and fuel lines. Assuming this activity isn't precluded by the Amended Order, the alternative heating arrangements may still require approval by the State Fire Marshal, an approval Cominco is not certain at this time it can obtain, at least without installing the fire protection systems within the MG-17 powerhouse. EPA's Amended Order precludes tying the MG-17 powerhouse into the fire protection system. This not only would leave this valuable asset at risk, but may also preclude use of the alternative heating system.

The MG-17 powerhouse, besides housing the generator itself, also houses new switch gear, transformers and other electrical distribution equipment. This electrical equipment is to be tied into the existing electrical distribution system to provide power to certain pieces of the new equipment installed under Cominco's production rate increase ("PRI") program. In order to commission and operate the additional equipment in the zinc floatation circuit and the new water treatment facilities, the new electrical systems in the MG-17 powerhouse must also be available. Thus, regardless of whether Cominco is allowed to run MG-17, it needs to be able to connect the module to its foundation and tie the electrical distribution equipment inside the powerhouse to the existing distribution system. Again, EPA's Amended Order doesn't allow this. Cominco might be able to bypass the powerhouse electrical distribution equipment, but this would require additional engineering work, equipment purchases and construction work. Again, at substantial additional cost. Cominco estimates the cost of supplying the alternative heat described in the previous paragraph, and the alternative electrical distribution system described in this paragraph, would run a million dollars or more.

4. Cominco Needs to Know Now Whether it Will Be Able to Operate Mg-17 as of January 1, 2001

Cominco's construction schedule calls for MG-17 being fully operational and available for use on January 1, 2001. As explained in my March 2, 2000 letter to you, the power from MG-17 is needed now to avoid significant losses in production of zinc concentrate. Cominco's power needs are continuing to become more critical as additional equipment is added and its power requirements incrementally increase. As also explained in my March 2, 2000 letter, Cominco will begin to suffer very substantial production losses starting in January 2001 if MG-17 is not on line. As of July, 2001, all of the equipment to be added as part of Phase II of PRI and the new water treatment equipment will be in place. Cominco's power requirements are such that if MG-17 is not operational by July 2001, Cominco will be producing substantially less concentrate than it could produce if it could utilize the power from MG-17. Cominco estimates this lost revenue (net of taxes) will be about \$34.4 million a year. It is important that EPA understand that this lost production and revenue will not be recouped until the end of the life of the mine. Each year Cominco will produce the maximum amount of concentrate it can produce, and thus any amount it can't produce this year as a result of EPA's Orders, will have to be made up at the end of the Mine's life. The discounted value of this production at the end of the fifty

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year predicted mine life is essentially zero in today's dollars. Thus, any production Cominco loses from not being able to operate MG-17 on January 1, 2001 will not only be substantial but permanent. EPA may want to note that the taxes Cominco pays on the sale of this lost production will also be delayed fifty years.

It is extremely unlikely that the Ninth Circuit will reach a final decision in this case before January 1, 2001. In order for Cominco to be able to operate MG-17 on January 1, 2001, EPA needs to stay its Order to allow Cominco to operate MG-17.

It is important that this stay be granted now, not only to avoid the losses I've described above, but also to avoid other significant financial risks. In considering Cominco's request for a stay, EPA should recognize that rating agencies, stock analysts, bankers and others regularly rely on production forecasts by Cominco. For example, representatives of Cominco Ltd. (second tier parent corporation of Cominco Alaska Incorporated) will be meeting with four of its rating agencies in May, and presenting Cominco Ltd.'s consolidated projected five year forecast that assumes certain production at Red Dog. The uncertainties created by EPA's Orders and thus future production at Red Dog may ultimately affect the availability and costs of funds borrowed by Cominco Ltd. or Cominco, and could potentially affect the value of Cominco Ltd. stock. It is again critical to Cominco that EPA's Orders be stayed now.

For the above reasons, Cominco reiterates its request that EPA stay its Orders to allow Cominco to proceed with the installation and operation of MG-17. We invite EPA to join Cominco and ADEC in a motion to the Ninth Circuit for a stipulated order staying the effect of EPA's Orders.

Sincerely,

HARTIG, RHODES, NORMAN,  
MAHONEY & EDWARDS PC  
Attorneys for Cominco Alaska Incorporated

By: 

Lawrence L. Hartig

cc: C. Leonard, Esq., State of Alaska, Attorney General's Office  
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